

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PETER J. VOGGENTHALER et al.,

Plaintiffs,

v.

MARYLAND SQUARE LLC et al.,

Defendants.

2:08-cv-1618-RCJ-GWF

ORDER

Currently before the Court is the U.S. Court of Appeals for the Ninth Circuit's opinion affirming in part, vacating in part, reversing in part, and remanding in part prior decisions of this Court.

DISCUSSION

This case involves claims and subsequent appeals stemming from tetrachloroethylene ("PCE") contamination from a dry cleaning facility that operated in a shopping center in Las Vegas, Nevada. Because the parties are familiar with the procedural history and facts of this case, the Court will not recite them here.¹

In July 2013, the Ninth Circuit issued an opinion on the consolidated appeals in this case. (Ninth Cir. Op. (#992) at 1-9). The Ninth Circuit affirmed in part and reversed in part this Court's judgments under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). (*Id.* at 9).

¹ The Ninth Circuit summarized the history of this case in its recent opinion. (See Ninth Cir. Op. (#992) at 14-20).

1 The Ninth Circuit affirmed several decisions and orders of this Court. (*Id.* at 40). First,
2 the Ninth Circuit affirmed this Court's rejection of Maryland Square's constitutional challenge
3 to the application of CERCLA in this case and affirmed the judgment against Maryland Square
4 and in favor of NDEP on its state law claims. (*Id.*). The Ninth Circuit affirmed this Court's
5 judgment in favor of NDEP and against SBIC on both the CERCLA and state law claims. (*Id.*).
6 The Ninth Circuit affirmed this Court's judgment against SBIC on the claims of the prior Site
7 owners for indemnity. (*Id.*).

8 However, the Ninth Circuit held that this Court erred by entering judgment against
9 Maryland Square on NDEP's CERCLA claim without giving Maryland Square an opportunity
10 to correct its deficiencies in its "bona fide prospective purchaser" submission. (*Id.*). The Ninth
11 Circuit vacated this Court's grant of summary judgment against Maryland Square and
12 remanded with instructions that this Court provide Maryland Square with an opportunity to cure
13 the formal and substantive deficiencies of its prior submission and establish that it has met the
14 statutory and regulatory requirements to qualify as a bona fide prospective purchaser. (*Id.* at
15 28). On remand, this Court now directs Maryland Square to file a new motion for summary
16 judgment addressing the bona fide prospective purchaser exception. NDEP may file a
17 response and Maryland Square may file a reply according to the timelines set forth in the
18 Federal Rules of Civil Procedure and the Local Rules.

19 The Ninth Circuit held that this Court erred in denying for lack of jurisdiction Maryland
20 Square's motion for reconsideration of the RCRA judgment. (*Id.* at 40). The homeowners had
21 sought an injunction under RCRA to require all of the owners of the Site, including Maryland
22 Square, to clean up the contamination. (*Id.* at 33). Maryland Square's original position was
23 the same as the other owners of the Site: ownership of the Site was insufficient to establish
24 liability. (*Id.*). This Court had rejected the Site owners' contention and granted summary
25 judgment for the homeowners. (*Id.*). Maryland Square then moved for rehearing and
26 advanced a new theory. (*Id.*). Maryland Square contended that it was in a different position
27 from the other owners because it had acquired the property after the dry cleaning facility had
28 closed down. (*Id.*). The homeowners opposed the motion for rehearing on the ground that

1 even if Maryland Square did not own the Site when the spills happened, Maryland Square's
2 demolition of the building in 2006 exposed the contaminated soil, exacerbating the problem
3 and making Maryland Square a contributor. (*Id.* at 33-34). This Court did not resolve the
4 issue and instead found that it had been divested of jurisdiction to decide the motion for
5 reconsideration when the other Site owners appealed the earlier order granting summary
6 judgment on the merits of the owners' RCRA liability. (*Id.* at 34).

7 The Ninth Circuit found that the appeal was prematurely taken from an interlocutory
8 order and reversed this Court's denial of the motion for reconsideration. (*Id.*). The Ninth
9 Circuit reversed and remanded so that the issue of Maryland Square's RCRA liability could be
10 fully considered. (*Id.*). On remand, this Court now directs Maryland Square to re-file its motion
11 for reconsideration and the homeowners to re-file their response. Maryland Square may file
12 a reply in accordance to the Federal Rules of Civil Procedure and the Local Rules.

13 The Ninth Circuit held that in the homeowners' RCRA action, this Court erred by
14 granting summary judgment against the operator, SBIC, *sua sponte*, followed by a RCRA
15 permanent injunction. (*Id.* at 34). The Ninth Circuit held that this Court erred because the
16 homeowners in the RCRA suit had never moved for summary judgment against SBIC. (*Id.*).
17 The Ninth Circuit held that determinations of liability and injunctive remedy are appropriate
18 only after a court has considered the positions of all parties. (*Id.* at 35). The Ninth Circuit
19 vacated the *sua sponte* orders and remanded. (*Id.* at 35, 41). On remand, the Court now
20 vacates the *sua sponte* entry of summary judgment and the permanent injunction entered
21 under RCRA against SBIC. (*Id.* at 40-41).

22 The Ninth Circuit held that, although this Court had properly found that the prior Site
23 owners were entitled to indemnification from SBIC, the Court erred in holding that Melvin
24 Shapiro was individually liable for indemnification on the basis of his personal guaranty that
25 operated only prospectively. (*Id.* at 40). The Ninth Circuit held that the violations had occurred
26 before Melvin Shapiro had signed the guaranty and that the guaranty did not apply
27 retroactively. (*Id.* at 39). The Ninth Circuit reversed the judgment against Melvin Shapiro and
28 remanded. (*Id.*). On remand, this Court now reverses the judgment for indemnity against

1 Melvin Shapiro and enters a judgment in favor of him. (*Id.* at 41).

2 **CONCLUSION**

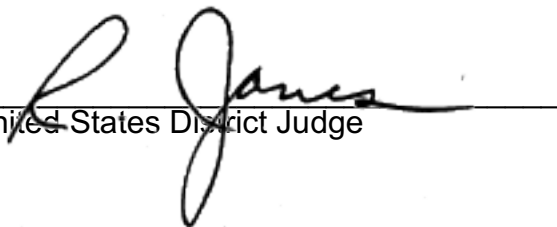
3 For the foregoing reasons, IT IS ORDERED that Maryland Square shall file a new
4 motion for summary judgment addressing the bona fide purchaser exception within 20 days
5 of this order. NDEP and Maryland Square may file a response and a reply in accordance with
6 the Federal Rules of Civil Procedure and the Local Rules.

7 IT IS FURTHER ORDERED that Maryland Square shall re-file its motion for
8 reconsideration within 20 days of this order. The homeowners may file a response and
9 Maryland Square may file a reply in accordance with the Federal Rules of Civil Procedure and
10 the Local Rules.

11 IT IS FURTHER ORDERED that the *sua sponte* entry of summary judgment and the
12 permanent injunction entered under the Resource Conservation and Recovery Act ("RCRA")
13 against SBIC is now VACATED.

14 IT IS FURTHER ORDERED that the judgment for indemnity against Melvin Shapiro is
15 REVERSED. The Clerk of the Court shall enter judgment in favor of Melvin Shapiro.

16 Dated this 16th day of September, 2013.

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20 United States District Judge
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